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SERVICE DATE - LATE RELEASE JANUARY 16, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33995

SF&L RAILWAY, INC.
– ACQUISITION AND OPERATION EXEMPTION –
TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION BETWEEN LA HARPE
AND PEORIA, IL

STB Finance Docket No. 33996

KERN W. SCHUMACHER AND MORRIS H. KULMER
– CONTINUANCE IN CONTROL EXEMPTION –
SF&L RAILWAY, INC.

Decided: January 16, 2001

This decision denies a petition to stay the effectiveness of the exemptions in these proceedings.

BACKGROUND

By notice filed on January 10, 2001, in STB Finance Docket No. 33995, SF&L Railway, Inc. (SF&L), a noncarrier, invoked the class exemption of 49 CFR 1150.31 et seq. to acquire an operating easement over, and the rail, ties, and improvements of, a 71.5-mile segment of track currently owned and operated by the Toledo, Peoria and Western Railway Corporation (TPW).¹ Under the transaction, TPW will retain the realty underlying the line, subject to a permanent and unconditional easement to permit SF&L to fulfill its obligations as a railroad common carrier. SF&L will employ TPW as a contract operator, although SF&L will be responsible for rendering service.

By notice also filed on January 10, 2001, in STB Finance Docket No. 33996, Kern W. Schumacher and Morris H. Kulmer (Applicants) invoke the class exemption of 49 CFR 1180.2(d)(2) to continue in control of SF&L after SF&L becomes a railroad common carrier

¹ The line runs between Milepost 194.5 at La Harpe (61450) and Milepost 123.0 at Peoria (61607), serving the intermediate points of Blandinsville, Sciota, Good Hope, Bushnell, New Philadelphia, Smithfield, Cuba, Canton, Glasford, and Mapleton, in Illinois.

pursuant to the transaction described in STB Finance Docket No. 33995.² Applicants state that they currently control three railroads subject to Board jurisdiction. Applicants assert that the transaction involves only Class III rail carriers.

By petition filed on January 16, 2001, Joseph C. Szabo, on behalf of the United Transportation Union-Illinois Legislative Board (UTU-IL), requests that the Board stay the effectiveness of these exemptions pending the filing and disposition of petitions to revoke or reject them. SF&L replied the same day.

DISCUSSION AND CONCLUSIONS

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits of a request for rejection or revocation; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. Washington Metropolitan Area Transit Comm. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921 (D.C. Cir. 1958). The party seeking stay carries the burden of persuasion on all of the elements required for stay. Canal Authority of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

Under this standard, UTU-IL's requests for stay will be denied. With regard to the first criterion, it has not met its burden of demonstrating that it is likely to prevail on the merits of a petition for rejection or revocation of the exemptions. UTU-IL alleges that the notice in STB Finance Docket No. 33995 is invalid on the grounds that SF&L would neither "acquire" nor "operate" the line. According to UTU-IL, SF&L would not acquire the line because TPW will retain the realty. This, however, does not make the transaction ineligible for the class exemption, for parties seeking to invoke the class exemption need not own the land over which they propose to operate. Nor does the transaction appear to be ineligible for the class exemption because SF&L would employ TPW as a contract operator. SF&L asserts that it will be responsible for rendering service over the line, and the use of another entity to provide the service is not grounds for a stay.

UTU-IL also has not shown that it is likely to prevail on the merits of a petition to revoke the exemptions under 49 U.S.C. 10502(d) as necessary to carry out the transportation policy of 49 U.S.C. 10101. UTU-IL argues (Petition, at 3) that "SF&L has not proven that its substitution for TPW would not be inconsistent with public convenience and necessity." However, our regulations do not put this burden on parties invoking the class exemptions.

² The notice was filed in a public version and in a redacted, confidential version that is not available to the public. The confidential version contained a copy of a 2-page letter confirming agreements entered into between SF&L and RailAmerica, Inc., the parent company of TPW.

In essence, UTU-IL's stay request is based on several claims – unclear, unsupported or both. The transaction is unusual, but UTU-IL has not shown in its filing any per se violations of statute, regulations or precedent. The petitioner's assertion that the resulting operations will be inefficient are speculative and has not been supported by any affected shippers on the line. By allowing the transaction to go forward, the petitioner and the Board will acquire hard evidence of operations – efficient or inefficient – under the new arrangement. Petitioner's claim that a stay is warranted to enable it to secure disclosure of information is unfounded. Petitioners do not need a stay to acquire the agreements they seek. The Board expects SF&L to provide them with protections as necessary to assure confidentiality. And the merits of UTU-IL's arguments can be dealt with more fully on a record developed in connection with a petition for revocation.

Nor has UTU-IL demonstrated immediate and irreparable harm. Rail service will continue as before, and TPW employees will continue to provide it. While UTU-IL indicates that it has been advised that two positions will be lost, it does not show that this would result in irreparable harm if UTU-IL should ultimately succeed in having the exemptions revoked.

For the reasons stated above, the stay will be denied.

This action will not significantly effect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU-IL's requests for stay are denied.
2. This decision is effective on its date of service.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams
Secretary